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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JEROME S. SPEVACK,
Petitioner,

vs.

LEWIS L. STRAUSS, ET AL.,
Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF ENGINEERS JOINT COUNCIL, INC., IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTEREST OF AMICUS CURIAE

Engineers Joint Council, Inc., is a corporation not for profit, organized under the laws of the State of New York. It was formed for the purpose of providing an agency to coordinate the activities of the major national professional engineering societies in matters of common interest to such societies.

Engineers Joint Council represents national engineering societies, regional engineering societies, and federations of engineering societies having a total membership of two hundred and fifty thousand engineers and scientists.

Since Engineers Joint Council represents such a vast number of our nation's engineers and the case at bar presents a serious threat to the fundamental rights of our country's engineers and scientists, consent was obtained to file this brief.

The issue in this case which is of primary concern to Engineers Joint Council is:

> "Was the Atomic Energy Act of 1954 correctly interpreted by the Court of Appeals for the District of Columbia circuit as directing or authorizing the Respondents to deprive a citizen of private property rights in an invention, which forms the subject matter of a pending U. S. patent application, which application and invention were disclosed to the U. S. Atomic Energy Commission in confidence according to the law, by publishing and/or publicly disseminating said subject matter without regard to the proprietary rights of the inventor thereof, without his consent, and to his detriment, where such act makes no provision for just compensation or due process of law for such deprivation."

This amicus curiae adopts the position of the petitioner with respect to this question.

STATUTORY PROVISIONS INVOLVED

Atomic Energy Act of 1954, Sections 1, 2, 3, 141, 142, 146, 151, 152 and 153; The Patent Act of 1952, sections 122, and 181, the applicable portions of which are stated further in the appendix hereto.

STATEMENT OF THE CASE

In the interest of brevity, this Amicus Curiae incorporates by reference herein the statement of the case as set forth in the petitioner's Petition for Writ of Certiorari herein.

ARGUMENT FOR GRANTING THE WRIT

1. National Scope of the Issues

The issues involved in this case affect the welfare and security of our country's engineers and scientists as well as the Atomic Energy Commission. If our nation's inventors have no way of protecting their property rights, which is the necessary result of the decision of the lower court, the initiative of engineers and scientists will be curtailed at a time when our country is in dire need of scientific knowledge. Such result is contrary to the purpose stated by Congress in the Atomic Energy Act of 1954 (42 U. S. C. §2013). The effect of the lower court's decision is to discourage rather than to encourage scientific research at the very time in our history when our country is relying on scientific progress for its very survival.

2. Construction of Atomic Energy Act of 1954

The issues in this case present substantial federal questions of first impression and of nationwide significance which should be settled by this court, namely:

a. Under the Atomic Energy Act, does an inventor who complies with the act, forfeit his rights under the Patent Act which insures confidential treatment of inventions (35 U. S. C. § 122)?

b. Does the Atomic Energy Act permit a taking of private property and subsequent disposition of the same by disclosure to the public, thereby destroying the inventor's property right without just compensation?

c. Should not the Atomic Energy Act be construed as follows:

To permit the publication of declassified formerly Retricted Data only in those instance where the Data is owned

outright by the federal government, but prohibit such publication where the invention and patent application belongs to a private individual but is disclosed to the Atomic Energy Commission in compliance with the Atomic Energy Act of 1954 and the Patent Act of 1952?

The ruling of the Court of Appeals of June 9, 1958, merely confirmed their previous ruling that Congress in the Atomic Energy Act of 1954 had authorized the publication complained of by the Petitioner. This ruling was based upon a reading of sections 3 (b) and 141 of the Act applicable provisions of any other laws, . . . " (42 U. S. C. and failed to take into account the provision of section 146 that "Sections 141 to 145, inclusive, shall not exclude the § 2166 (a)). Section 122 of the Patent Act of 1952 provides that applications for patents shall be kept in confidence and no information given concerning them without the permission of the owner except as may be required by other acts of Congress (35 U. S. C. § 122). Section 181 of the Patent Act of 1952 provides the method by which applications for patents are made available to the Atomic Energy Commission (35 U. S. C. § 181). It would seem obvious that these statutes when read together preserve the secrecy of pending patent applications subject only to the right of the Atomic Energy Commission to have access to the applications and processes covered by the applications as the national interest may require.

This conclusion is strengthened by consideration of the language used in Section 2 of the Atomic Energy Act of 1954 in which Congress stated its findings and says "In permitting the *property* of the United States to be used by others, such use must be regulated in the national interest . . ." (42 U. S. C. § 2012 b) (emphasis added). Clearly Congress in legislating for the use of property in the field of peaceful uses of atomic energy was concerned with the

use of United States Government property and not with that of private persons.

3. Denial of Jurisdiction by the Lower Court is in Conflict With Prior Decisions of the Supreme Court of the United States

The lower court relied upon the following cases in denying jurisdiction as an unconsented suit against the United States:

Larson v. Domestic and Foreign Commerce Corporation, 337 U. S. 682, 93 L. Ed. 1645;
State of Arizona v. Hobby, 94 U. S. App, D. C. 170. 221 F. 2nd 498.

These decisions dealt with attempts by litigants to control the exercise of governmental power by United States officials over property of the United States. This case deals with property belonging to individual persons. In the *Larson* case there was no claim that the officials were acting beyond the scope of their authority under the statute in question.

In the case of *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 95 L. Ed. 817, this court upheld a suit against the attorney general of the United States and cited the *Larson* case in its opinion:

> "Only recently this Court recognized that 'the action of an officer of the sovereign (be it holding, taking or otherwise legally effect the plaintiff's property) can be regarded as so illegal as to permit a suit for specific relief against the officer as an individual * * * if it is not within the officer's statutory powers or, if within those powers, * * * if the powers, or their exercise in the particular case, are constitutionally void'." *Larson v. Domestic and Foreign Commerce Corporation*, 337 U. S. 682, 701, 702, 93 L. Ed. 1628, 1642.

Therefore, the decision of the lower court misapplied the *Larson* case, which should be regarded as authority for the propriety of this action, and is in direct conflict with the doctrine set down by this court in the following cases:

Goltra v. Weeks, 271 U. S. 536, 70 L. Ed. 1074, 46 S. Ct. 613;

Ickes v. Fox, 300 U. S. 82, 81 L. Ed. 525, 57 S. Ct. 412;

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209, 67 S. Ct. 1009;

United States v. Lee, 106 U. S. 196, 27 L. Ed. 171, 1 S. Ct. 240.

CONCLUSION

Since the issues in this case are of nationwide importance and present substantial federal questions of first impression, it is respectfully requested that this court grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

Atomic Energy Act of 1954.

August 30, 1954, c. 1073, Sec. 1; 68 Stat. 921 et seq.; 42 U. S. C. (Supp. IV) Sec. 2011 et seq:

"Sec. 2. (68 Stat. 921; 42 U. S. C. Sec. 2012) Findings. The Congress of the United States hereby makes the following findings concerning the development, use, and control of atomic energy:

"b. In permitting the property of the United States to be used by others, such use must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public."

"Sec. 3. (69 Stat. 922; 42 U. S. C. Sec. 2013) Purpose.—It is the purpose of this Act to effectuate the policies set forth above by providing for—

"a. a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

"b. a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data. subject to appropriate safeguards, so as to encourage scientific and industrial progress;

"f. a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate."

"Chapter 12. Control of Information

"Sec. 141 (68 Stat. 940; 42 U. S. C. Sec. 2161) Policy.—It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security. Consistent with such policy, the Commission shall be guided by the following principles:

"b. The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information."

"Sec. 142. (68 Stat. 941; 42 U. S. C. 2162) Classification and Declassification of Restricted Data.—

"a. The Commission shall from time to time determine the data, within the definition of Restricted Data, which can be published without undue risk to the common defense and security and shall thereupon cause such data to be declassified and removed from the category of Restricted Data.

"b. The Commission shall maintain a continuous review of Restricted Data and of any Classification Guides issued for the guidance of those in the atomic energy program with respect to the areas of Restricted Data which have been declassified in order to determine which information may be declassified and removed from the category of Restricted Data without undue risk to the common defense and security."

"Sec. 146. (68 Stat. 943; 42 U. S. C. Sec. 2166) General Provisions—

"a. Sections 141 to 145, inclusive, shall not exclude the applicable provisions of any other laws, except that no Government agency shall take any action under such other laws inconsistent with the provisions of those sections.

"b. The Commission shall have no power to control or restrict the dissemination of information other than as granted by this or any other law."

Section 151 (a), (b); 42 U. S. C. (Supp. IV) § 2181)

"(a) No patent shall hereafter be granted for any invention or discovery which is useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon. Any patent granted for any such invention or discovery is revoked, and just compensation shall be made therefor.

(b) No patent hereafter granted shall confer any rights with respect to any invention or discovery to the extent that such invention or discovery is used in the utilization of special nuclear material or atomic energy in atomic weapons. Any rights conferred by any patent heretofore granted for any invention or discovery are revoked to the extent that such invention or discovery is so used, and just compensation shall be made therefor."

"Sec. 122 Confidential Status of Patent Applications.—

"Any invention or discovery, useful in the production or utilization of special nuclear material or atomic energy, made or conceived under any contract, subcontract, arrangement, or other relationship with the Commission, regardless of whether the contract or arrangement involved the expenditure of funds by the Commission, shall be deemed to have been made or conceived by the Commission, except that the Commission may waive its claim

to any such invention or discovery if made or conceived by any person at or in connection with any laboratory under the jurisdiction of the Commission as provided in section 2053 of this title, or under such other circumstances as the Commission may deem appropriate . . .

"The Commissioner of Patents may proceed with the application and issue the patent to the applicant (if the invention or discovery is otherwise patentable) unless the Commission, within 90 days after receipt of copies of the application and statement, directs the Commissioner of Patents to issue the patent to the Commission (if the invention or discovery is otherwise patentable to be held by the Commission as the agent of and on behalf of the United States . . ."

Section 153 (a), (g); 42 U. S. C. (Supp. IV § 2183)

"(a) The Commission may, after giving the patent owner an opportunity for a hearing, declare any patent to be affected with the public interest if (1) the invention or discovery covered by the patent is of primary importance in the production or utilization of special nuclear material or atomic energy; and (2) the licensing of such invention or discovery under this section is of primary importance to effectuate the policies and purposes of this chapter.

(g) The owner of the patent affected by a declaration or a finding made by the Commission pursuant to subsection (b) or (e) of this section shall be entitled to a reasonable royalty fee from the licensee for any use of an invention or discovery licensed by this section. Such royalty fee may be agreed upon by such owner and the patent licensee, or in the absence of such agreement shall be determined for each patent license by the Commission pursuant to section 2187 (c) of this title."

Patent Act of 1925:

"Sec. 122 Confidential Status of Patent Applications.—

Applications for patents shall be kept in confidence by the Patent Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner (of Patents)" (July 19, 1952, c. 950, sec. 1, 66 Stat. 801; 35 U. S. C. 122).

"Sec. 181. Secrecy of Certain Inventions and Withholding of Patent.—

. . . Whenever the publication or disclosure of an invention by the granting of a patent, in which the Government does not have a property interest, might, in the opinion of the Commissioner (of Patents) be detrimental to the national security, he shall make the application for patent in which such invention is disclosed available for inspection to the Atomic Energy Commission . . .

. . . If, in the opinion of the Atomic Energy Commission . . . the publication or disclosure of the invention by the granting of a patent therefor would be detrimental to the national security, the Atomic Energy Commission, . . . shall notify the Commissioner (of Patents) and the Commissioner (of Patents) shall order that the invention be kept secret and shall withhold the grant of a patent for such period as the national interest requires, and notify the applicant thereof . . .

. . . The Commissioner (of Patents) may rescind any order upon notification by the heads of the departments and the chief officers of the agencies who caused the order to be issued that the publication or disclosure of the invention is no longer deemed detrimental to the national security." (July 19, 1952, c. 950, Sec. 1, 66 Stat. 805; 35 U. S. C. Sec. 181).